LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
APR 18 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 888

JOHN V. BOLAND CONSTRUCTION COMPANY, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

SCOTT G. RIGBY
430 Wyatt Building
777 Fourteenth Street, N. W.
Washington 5, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinion	1
Jurisdiction	1
Questions Presented	2
Statute	2
Contract Provisions	2
Statement	6
Argument	9
Conclusion	12
Appendix:	
Order of the Court	1a
Findings of Fact	2a
Decision of Claims and Appeals	28a

CITATIONS

Cases:

Allied Contractors v. U.S., 1954, 124 F. Supp. 366; Cert. denied, 348 U.S. 950	10
American Security Co. v. Pauly, 170 U.S. 133, 160	10
Atlantic Carriers v. U.S., D.C.N.Y., 1955, 131 F. (2d) 1	12
U. S. v. Bethlehem Steel Co., 315 U.S. 289, 298-299	9
Blair v. U.S., 164 U.S. F. (2d) 115; Cert. denied, 333 U.S. 880	10
Borer v. Chapman, 119 U.S. 587	11
Hollerbach v. U.S., 233 U.S. 165, 171-172	9
Manufacturers Aircraft Assoc. v. U.S., 77 Ct. Cls. 522; Cert. denied, 291 U.S. 667	11
Noonan v. Bradley, 9 Wall. 407	10
U. S. v. Standard Rice Co., 323 U.S. 106	9
U. S. v. Wurts, 303 U.S. 414	11

Statutes:

Act of September 3, 1954, 68 Stat. 1246	2
Act of December 18, 1941, 55 Stat. 839 (First War Power Act)	12
C. F. Act of May 11, 1954, 68 Stat. 81	10
Williston, Contracts, Vol. 9 (1945), Sec. 46	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No.

JOHN V. BOLAND CONSTRUCTION COMPANY, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a writ of certiorari issue to review the order of the United States Court of Claims entered in the above entitled cause on January 19, 1962.

OPINION BELOW

The opinion of the Court of Claims (Appendix, *infra*, p. 1A) was entered on January 19, 1962, and ordered the petition dismissed.

JURISDICTION

This Petition is timely filed and the jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTIONS PRESENTED

1. Whether Petitioner was required to follow the procedure created by Article 6 for the settlement of disputes arising under the contract before bringing suit in the Court of Claims.

2. Whether Petitioner duly filed its claim with the Court of Claims within six years after such claim first accrued, as required by the Statute of Limitations.

STATUTE INVOLVED

Act of September 3, 1954, C. 1263, 352, 68 Stat. 1246, 28 U.S.C. 2501:

> "Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereof is filed within six years after such claim first accrues."

CONTRACT PROVISIONS INVOLVED

Contract No. DA-25-066-ENG-480

ARTICLE 3. *Changes and Extras.*—The Contracting Officer may at any time, in writing, and without notice to the sureties, order extras or make changes in the drawings and or specifications of this contract providing such extras or changes are within the general scope thereof. If such extras or changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim of the Contractor for adjustment under this article must be asserted in writing within 30 days from the date the extra or change is ordered: Provided, however, That the Contracting Officer, if he determines that the facts justify such action, may receive and con-

sider, and, subject to such approval as the head of the department may require, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Article 6 hereof. But nothing provided in this article shall excuse the Contractor from proceeding with the prosecution of the work.

ARTICLE 4. *Changed conditions.*—Should the Contractor encounter, or the Government discover, during the progress of the work subsurface and or latent physical conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown physical conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the Contracting Officer shall be notified immediately in writing of such conditions before they are disturbed. The Contracting Officer shall thereupon promptly investigate the conditions, and if he finds they do so materially differ, the contract shall, subject to such approval as the head of the department may require, be modified to provide for an equitable adjustment in contract price and or difference in time resulting from such conditions. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Article 6 hereof.

ARTICLE 5. *Delays-Damages.*—(a) Termination for Default.—If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in the contract, or any extension thereof, or fails to complete said work within such time, the Gov-

ernment may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the Contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby, as well as for liquidated damages for delay, as fixed in the specifications or accompanying papers, for such reasonable time as may be required to complete the work, or if liquidated damages are not so fixed, the Contractor and his sureties shall be liable to the Government for any actual damages occasioned by such delays. If the Contractor's right to proceed is so terminated, the Government may take possession of and utilize for completing the work such material, appliances, and plant as may be on the site of the work and necessary therefor.

(b) Damages for Delay.—If the Government does not terminate the right of the Contractor to proceed, as provided in this article, the Contractor shall continue the work, in which event he and his sureties shall be liable to the Government, in the amount set forth in the specifications or accompanying papers, for liquidated damages for each calendar day of delay until the work is completed, or if such liquidated damages are not so fixed, any actual damages occasioned by the delay.

(c) Time Extensions. The right of the Contractor to proceed shall not be terminated as provided in this article, nor the Contractor charged with liquidated or actual damages, because of any delays in the completion of the work due to causes which he could not reasonably have anticipated and which were due to

causes beyond his control and without his fault or negligence, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, either in its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargo, and unusually severe weather, or delays of subcontractors due to such causes; provided however, that the Contractor shall promptly notify the Contracting Officer in writing of the causes of such delay. Upon receipt of such notification the Contracting Officer shall ascertain the facts and the extent of such delay and, if in his judgment the facts so justify, shall extend the time for completing the work commensurate with the period of excusable delay. The Contracting Officer's findings of fact thereon shall constitute his decision which shall be final and conclusive on the parties hereto subject to appeal by the contractor within thirty (30) days therefrom as provided in the "Disputes" Article herein.

ARTICLE 6. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact which may arise under this contract, or disputes which may arise under the plans and specifications attached hereto, and which are not disposed of by mutual agreement, shall be decided by the Contracting Officer, who shall reduce his decision to writing and send by registered mail, return receipt requested, a copy thereof to the Contractor at his address shown herein. Within 30 days from the mailing thereof the Contractor may appeal in writing to the Chief of Engineers, whose written decision thereon, or that of his designated representative or representa-

tives, shall be final and conclusive on the parties hereto unless, within 30 days after the receipt thereof by the Contractor, he appeals in writing to the Secretary of the Army, which appeal shall operate to vacate said decision of the Chief of Engineers. If the dispute is determined by the Secretary of the Army, his written decision, or that of his designated representative or representatives, shall be final and conclusive upon the parties hereto. The Chief of Engineers or the Secretary of the Army may designate an individual, or individuals, other than the Contracting Officer, or a Board, as his authorized representative to hear and determine appeals under this Article. In any proceedings under the provisions of this Article, the Contractor shall be afforded an opportunity to be heard and offer evidence in support of his appeal. Pending decision of a dispute hereunder, the Contractor shall diligently proceed with the performance of this contract. Any sum or sums allowed to the Contractor under the provision of this Article shall be paid by the Government as part of the cost of the articles of work herein contracted for and shall be deemed to be within the contemplation of this contract.

STATEMENT

On August 17, 1950, Petitioner and Respondent, through the U. S. Army, Corps of Engineers, entered into Contract No. DA-25-066-ENG-480 for the construction of a weather station and numerous appurtenant facilities at Kirksville, Missouri. This contract contained the provisions set out above.

Notice to proceed under this contract established the original completion date as June 13, 1951. By supplemental agreements, the completion date for Bene-

ficial Occupancy of certain structures and utilities was established as March 15, 1951, and the over-all completion date was extended to September 19, 1951. All work required for Beneficial Occupancy was assumed as of March 19, 1951, and the project was formally accepted as complete on September 10, 1951.

Negotiations between the parties during the period September 20, 1951, through April 7, 1952, resulting in approximately 46 adjustments of the contract price, were contained in modifications issued after the contract completion date.

On April 8, 1952, at the suggestion of the Respondent, Petitioner filed a request for relief under Title II, First War Powers Act, as amended, for those items of damage not resolved by the above negotiations. The granting of relief under said Act was not a matter of right but was at the discretion solely of the Respondent. On November 18, 1952, Petitioner's request for relief was denied, and a re-hearing requested on November 19, 1952, was denied on January 14, 1953.

On May 11, 1953, Petitioner filed its formal claim under the contract with the contracting officer (in the same office that had previously considered the request for relief, *supra*). This claim, as amended, was for $272,063.07 as extra compensation under Articles 3, 4 and 5 of the contract.

On October 2, 1953, the initial claim was denied for the stated reasons that (a) Petitioner's failure to present timely requests for adjustment and extensions of time prejudiced the Government's ability to ascertain the facts, and (b) because no protests to or appeal from equitable adjustments of price and time contained in modification and or decisions of the contracting officer

were made within the stipulated time. This initial denial was appealed by Petitioner pursuant to Article 6 of the contract.

Subsequently, after numerous conferences between the parties and several supplements to the initial claim, on July 15, 1955, the contracting officer denied the claim, as amended, upon the grounds, *inter alia*, that "the claim is one for damages which the contracting officer does not have authority to consider under the administrative procedures provided in the contract", and (2) "Because of [Petitioner's] failure to assert claims in writing within the thirty day period specified in Article 3 and his laches in not asserting them until approximately a year and a half after completion of all the contract work, ..." (Appendix p. 2a, *infra*.)

Thereafter, on June 19, 1958, the Corps of Engineers Claims and Appeals Board, as the intermediate appellate authority designated in Article 6 of the contract, denied all but one item of the claim for the same reasons given by the contracting officer. (Appendix 28a, *infra*.) A further appeal to the Armed Services Board of Contract Appeals was not pursued by Petitioner.

On May 4, 1959, Petitioner filed its petition in the U. S. Court of Claims. The Respondent filed its answer, dated October 30, 1959, asserting Petitioner's failure to exhaust its administrative remedy and, alternatively, pleading the Statute of Limitations. On February 2, 1960, Petitioner took issue by filing its Motion to Strike such portions of Respondent's answer. By Order dated March 10, 1961 Petitioner's Motion was denied by the Court of Claims. Defendant's Motion for Summary Judgment, dated July 24, 1961, was granted by the Court's Order, dated January 19, 1962.

ARGUMENT

I. Was the Petitioner Required to Follow the Administrative Procedure Provided for the Settlement of Factual Disputes After Breach of the Contract By Respondent

The record is clear that in the instant case the contract expressly provided for an extension of time in the event that Petitioner was delayed in its performance by "unusually severe weather"; that "unusually severe weather conditions" existed during the performance of the contract; that Respondent had both *actual* and *constructive* knowledge of such weather conditions; that Respondent advised Petitioner that because of the emergency nature of the work any formal request for an extension of time as prescribed by the contract would be denied; and that Respondent's refusal to grant an appropriate extension of time thereby required Petitioner to accelerate its performance schedule with resultant damages.

Inasmuch as the contract in the instant case is free from ambiguity, it hardly seems necessary to resort to rules of construction and interpretation applied by this Honorable Court in ascertaining the meaning and intent of ambiguous contracts. Nevertheless, there are certain well recognized rules that are pertinent to this case.

The United States as a contractor must be treated as other contractors under analogous situations. When the problem of the interpretation of its contracts arises, the law of contracts governs and the courts will treat the United States like any other contractor. *U.S. v. Standard Rice Co.*, 323 U.S. 106; *Hollerbach v. United States*, 233 U.S. 165, 171-172; *United States v. Bethlehem Steel Co.*, 315 U.S. 289, 298-299.

Furthermore, the contract, plans and specifications in this case were prepared by the Respondent and furnished by it to the Petitioner. The rule of law has been announced many times that under such circumstances that the contract will be construed most strongly against the one who prepares it. *American Surety Co.* v. *Pauly*, 170 U.S. 133, 160.

Another important rule of construction of contracts is that principles of right and justice should control, and if an instrument is susceptible of two constructions, that one should be favored which avoids working an injustice. *Noonan* v. *Bradley*, 9 Wall. 407; *Williston, Contracts*, Vol. 9 (1945), Sec. 46.

The only provision of the contract which vests authority of decision in the administrative boards is Article 6, *supra*, and it expressly limits such decisions to disputes concerning *questions of fact*. In the instant case there is involved the question of authority of the contracting officer under the terms of the contract and the question of what legal doctrine applies to a breach of contract, and what legal effect follows such action. The rule is well established that such questions are for determination by the courts and not by administrative boards. *Allied Contractors* v. *U.S.*, 1954, 124 F. Supp. 366; cert. denied, 348 U.S. 950; *Blair* v. *U.S.*, 164 U.S. F. (2d) 115, cert. denied, 333 U.S. 880. cf. Act of May 11, 1954, 68 Stat. 81.

II. Was Petitioner's Action Filed With the Court of Claims Within Six Years After It First Accrued?

The position of the Respondent adopted by the Court of Claims is that all claims of Petitioner under the contract for the purpose of bringing suit accrued when the construction work called for by the contract was

completed and formally accepted by the Respondent, namely, September 10, 1951. Acceptance of this date provides a convenient time to commence the running of the statute provided it is assumed that Petitioner's "rights" had accrued in a shape to be effectually enforced. *U. S.* v. *Wurts*, 303 U.S. 414; *Borer* v. *Chapman*, 119 U.S. 587.

Whether the cause of action in a particular case accrues at such time (date of acceptance) depends upon the agreement or arrangement between the parties. Their *express agreement or their understanding and course of conduct* may fix a different time for the accrual of the claim for the purpose of computing the Statute of Limitations. (*Manufacturers Aircraft Assoc.* v. *U. S.*, 77 Ct. Cls. 481, 522; cert. denied, 291 U.S. 667.)

In the instant case both parties recognized at the time of the formal acceptance of the work that numerous problems that had arisen under the contract were still unresolved and would require certain determinations, decisions, or action after the actual completion of the work. In fact, the parties continued negotiations during the months following the formal acceptance and resolved many of the disputes by mutual agreement as evidenced by approximately 46 modifications to the contract during the period September 20, 1951 through April 7, 1952. It is clear from the foregoing that both parties considered the contract as in being and subject to modification and certainly not one where the rights of the parties had crystallized.

Thereafter, at the suggestion of the Respondent, a different approach was adopted by the parties to dispose of the remaining unresolved problems. Petitioner

submitted a request for relief under the Act of December 18, 1941, 55 Stat. 839. (First War Powers Act). This authorized a procedure *ex contractu* which vested extraordinary discretionary powers in the contracting officer. This request for relief was submitted on April 8, 1952, and denied on November 18, 1952, with request for reconsideration denied on January 14, 1953.

It is clear from the foregoing that both parties considered the contract as being subject to negotiation and any disputes subject to settlement until January 14, 1953. Thereafter, Petitioner formalized the remaining unresolved problems and submitted them for final determination of the contracting officer on May 4, 1953. *No final determination was made by the contracting officer and no cause of action accrued until his decision denying the claim was rendered on October 2, 1953.* Until that date there had been no formal refusal to comply with the terms of the contract and the formal breach of the contract at that time crystallized Petitioner's rights and commenced the running of the statute of limitations. *Atlantic Carriers* v. *U. S. D.C.N.Y.*, 1955, 131 F. (2d) 1.

CONCLUSION

For the reasons stated, this petition for certiorari to the U. S. Court of Claims should be granted.

Respectfully submitted,

Scott G. Rigby
430 Wyatt Building
777 Fourteenth Street, N. W.
Washington 5, D. C.

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 200-59

JOHN V. BOLAND CONSTRUCTION COMPANY

v.

THE UNITED STATES

Order

This case comes before the court on defendant's motion for summary judgment and plaintiff's response thereto. Upon consideration thereof, together with the briefs of the parties and oral argument of counsel it is concluded that plaintiff failed to exhaust its administrative remedy by failing to file a timely appeal from the decision of the Corps of Engineers Claims and Appeals Board to the Armed Services Board of Contract Appeals and that plaintiff's claim is barred by the statute of limitations, 28 U.S.C. sec. 2501 (1958 ed.), in that its petition was filed more than 6 years after its claim first accrued.

NOW, THEREFORE, IT IS ORDERED that the petition herein be and the same is dismissed.

BY THE COURT

MARVIN JONES
Chief Judge

Jan. 19, 1962.

Finding of Fact

Appeal—John V. Boland Construction Co.
2715 Dalton Avenue
St. Louis 9, Missouri
Contract No. DA-25-066-eng-480
Dated 17 August 1950
For Construction of Weather Station P-64 At a Location Designated by the Contracting Officer (Kirksville, Missouri)

DATE: 15 July 1955

A. THE CONTRACT

1. The lump-sum contract amount was $731,523 which was revised by Modifications Nos. 1 thru 16 to $878,903.66. Work was originally to be completed not later than 285 calendar days after receipt of Notice to Proceed. Notice to Proceed (Exhibit No. 1) was issued on 30 August 1950 and receipt acknowledged by Appellant on 1 September 1950 establishing the original completion date as 13 June 1951. By Supplemental Agreement No. 2 (Exhibit No. 2) the completion date for Beneficial Occupancy of certain structures and utilities was established as 15 March 1951. The over-all completion date was extended to 19 September 1951 by Change Order No. 8 (Exhibit No. 3). Appellant has been assessed $400 liquidated damages for delay in completion of Supplemental Agreement No. 2 work. All work required for Beneficial Occupancy was accepted as of 19 March 1951 (Exhibit No. 4) and the remaining contract work was accepted as of 10 September 1951 (Exhibit No. 5). Work was under the District Engineer, Omaha District, Corps of Engineers. The Resident Engineer, Mr. Lloyd V. Tyner was the designated representative of the Contracting Officer.

2. The dispute generally involves the entire project; the principal features of work were as follows:

Technical Buildings
- Operations Building
- Power Building
- Radio Buildings A and B (2)
- Tower Foundation

Accessory Buildings
- Heating Plant
- Bachelors' Quarters (3)
- Bachelor Officers' Quarters
- Mess Hall
- Supply, Administration & Recreation
- Gatehouse
- Maintenance Building
- Gas Supply System

Utilities
- Well House (2), Pumphouse, Tank
- Sewage Treatment
- Water Distribution
- Sewer Lines, Manholes
- Steam Distribution
- Electrical Distribution

Roads, Grading, Walks, Fence, Seeding
- Culverts
- Site Grading
- Roads (Earthwork)
- Roads (Surface)
- Walks, Curbs, Guard Post
- Fence
- Seeding

3. There are no other Claims and Appeals or Litigation pending involving this contract or others. However, Appellant has been directed to credit the Government $143.08 for

omission of certain strainers from the heating system (Exhibits Nos. 6, 7, 8, and 9) which he has refused to allow (Exhibit No. 10). Appellant's surety on the payment bond has requested that it be allowed $32,650.79 as a claim against the United States, in the event the appeal in whole or part is allowed, for payments made to subcontractors and materialmen under the bond (Exhibit No. 11). All monies due have been paid except $91.23 which has been retained pending settlement of the disputes.

B. The Claim and Appeal

4. During the period 20 September 1951 through 7 April 1952, no requests for adjustment of the contract price were made which were not disposed of by mutual agreement. Approximately 46 adjustments of the contract price were contained in modifications issued after the contract completion date which increased the contract by approximately $6,634.00. On 8 April 1952 (Exhibit No. 12). Appellant filed a request for relief under Title II, First War Powers Act, as amended, for $433,574.14 additional. Appellant's request for relief was denied and Appellant was so advised on 18 November 1952 (Exhibit No. 13). A re-hearing, requested on 19 November 1952 (Exhibit No. 14) was denied on 14 January 1953 (Exhibit No. 15). By letter of 11 May 1953 (Exhibit No. 16), Appellant thereupon claimed extra payment of $265,836.40 for eight (8) items as follows:

I. Acceleration of Construction Schedule as a Result of Government's Failure to Grant Justifiable Extensions and Inclusion of Extra Work.

II. Acceleration of Construction Schedule Resulting From Government's Requirement of Permanent Utilities for Beneficial Occupancy.

III. Acceleration of Permanent Water Lines for Beneficial Occupancy and Loss of Efficiency in Construction.

IV. Additional Maintenance Work (Painting and Carpentry) Labor in Firing Boilers, Road Rebuilding and Moving from Maintenance Building because of Beneficial Occupancy by troops in advance of the June 1951 completion date.

V. Acts of the Government in Failing to Make a Water Supply Available.

VI. Extra Flooring Work in Excess of the Specification Requirements.

VII. Extra Work in Constructing Interior Bearing Partitions Contrary to Plans and Specifications.

VIII. Miscellaneous Extra Electrical Work.

Thereafter a series of correspondence ensued (Exhibits Nos. 20, 21, 22, 23, and 24) and a conference was held in the office of the District Engineer with Appellant's attorney on 14 July 1953. Appellant thereafter desired to submit supplemental information (Exhibits Nos. 25 and 26).

5. A supplement to the claim was made by letter of 25 August 1953 (Exhibit No. 17). The claims were denied on 2 October 1953 because (a) Appellant's failure to present timely requests for adjustment and extensions of time prejudiced the Government's ability to ascertain the facts and (b) because no protests to or appeal from equitable adjustments of price and time contained in modifications and or decisions of the Contracting Officer were made within the stipulated time (Exhibit No. 18). Appeal by letter of 27 October 1953 (Exhibit No. 19) is considered timely.

6. On 29 October 1953, at a conference in the office of the District Engineer, Appellant requested that he be permitted to submit supplemental data in support of his appeal and requested that processing be held in abeyance until the data was submitted (Exhibit No. 27). Subsequent correspondence is attached as Exhibits Nos. 28, 29, 30, and

31. By letter of 23 October 1953 (Exhibit No. 32), Appellant's attorneys, Cummings, Stanley, Truit & Cross, advised the District Engineer that they had terminated representation of Appellant in connection with its claims under the subject contract. The Appeal of 27 October 1953 was personally delivered to the Contracting Officer by Paul Dillon, Attorney, of St. Louis, Missouri. On 15 December 1953, Appellant then employed Mayer, Rigby & Seeley of Washington, D. C. as Counsel and the latter requested a conference (Exhibits Nos. 33, 34, 35, 36, 37, and 38) which was held on 16 February 1954 at which time Appellant requested that he be permitted to file an additional supplement (Exhibit No. 39). Additional correspondence is attached as Exhibits Nos. 40 thru 45. On 6 April 1955, another supplement (Exhibit No. 46) was furnished.

7. The claimed amount of $265,836.40 (Exhibit No. 16) was revised by the supplement to $272,063.07 which included 35% for overhead and 10% profit. Items V, VII, and VIII of Paragraph 4, supra, were omitted from the supplement. The over-all claim was also generally revised. Extra payment was requested for the following:

a. Extra labor, Insurance, Taxes, Material, and Miscellaneous Costs incurred during a 60-day period of unusually severe weather because of:

(1) The Contracting Officer's alleged failure to grant justifiable extensions of time (which are alleged to have been orally requested by Appellant).

(2) An alleged order to accelerate construction of certain buildings[1] for Beneficial Occupancy to accommodate additional troops in advance of the June 1951 completion date although the structures were not covered by Supplemental Agreement No. 2.

---

[1] Bachelor Officers Quarters Building, two Bachelor Quarters Buildings, and Supply and Administration Building.

(3) An alleged order to accelerate construction of Permanent Utilities[2] for Beneficial Occupancy although these facilities were not covered in Supplemental Agreement No. 2.

b. Order of the Contracting Officer to install permanent water lines for structures covered by Beneficial Occupancy which resulted in the presence of unfilled ditches caused by delayed delivery of valves resulting from late approval of valve shop drawings and the Government's failure to furnish water for testing purposes, by virtue of which Appellant performed extra work to maintain trenches in condition and necessary foot bridges and to reroute men and vehicles during the period of unusually severe weather.

c. Extra costs for maintenance work by carpenter and painter labor on completed items after troop occupancy but before final acceptance and the furnishing of temporary heat for troops prior to completion.

d. Extra costs incurred in repairing roads, damaged by Government vehicles and other contractors.

e. Extra costs resulting from the alleged order to remove all knots and shakes from flooring contrary to specifications.

8. By letter of 28 April 1955, Appellant was advised that he had not submitted facts or any new matter which would warrant a reconsideration of the previous decision (Exhibit No. 47).

C. Contentions of Appellant

9. a. The Contracting Officer's disregard of Appellant's oral requests for extensions of time and claims of increased costs, and demands for prompt completion con-

[2] Water Tank, Pumphouse, Central Heating Plant, Sewers, Water Lines, Steam Lines, and Road Grading.

stituted orders for "extras" within the meaning of Article 3 of the contract with respect to any costs incurred by Appellant in completing the Supplemental Agreement Facilities, which would not have been incurred if a reasonable extension of time (60 calendar days) had been granted.

b. Because of the Contracting Officer's alleged notification of occupancy of additional troops in buildings not included in Supplemental Agreement No. 2 in advance of the contract completion date, and an alleged order to complete such structures prior to that date, Appellant is entitled to an equitable adjustment for Government's possession prior to completion pursuant to Contract Article 3 and Specification Paragraph GC-10.

c. Although Supplemental Agreement No. 2 allegedly did not require completion of permanent utilities to serve the structure covered by Beneficial Occupancy, Appellant was ordered to complete such utilities by 15 March 1951 for which equitable adjustment is due.

d. Although Supplemental Agreement No. 2 allegedly did not require completion of permanent water lines, Appellant was ordered to complete same by 15 March 1951, for which equitable adjustment is due for premature digging of trenches and their remaining open throughout the winter due to late delivery of materials and the Government's failure to supply water for testing lines, in lieu of completing permanent water lines after the winter months.

e. Because of acts of troops occupying the premises, Appellant was obligated to perform certain maintenance work on completed facilities (carpenter, painter labor and repair of damaged roads) and because of an alleged order to provide heat for troops in occupancy, equitable adjustment should be made under Specification Paragraph GC-10.

f. Because the Government Inspector and/or Resident Engineer verbally ordered Appellant to remove all knots and shakes from flooring to be covered by asphalt tile contrary to specification paragraph 10-15*a* which only required removal of loose knots and knotholes. Appellant incurred extra costs for which equitable adjustment is due.

g. Appellant did not make prompt written claim for extension of time because, despite oral requests and protests, Appellant was told that no extensions would be granted; Appellant did not make written claims for adjustment within thirty days from the date they may have been ordered because (1) the claims were general in their nature in the "early stages" because it was impossible to forecast at that time what the definite claimed amounts would be, and (2) it would have been impracticable for Appellant to do so.

D. Pertinent Contract Articles and Specification Provisions

10. In addition to the contract provisions outlined in the Contracting Officer's decision of 2 October 1953 (Exhibit No. 18), the following are applicable:

"SC-14 *Inspection.* The work will be conducted under the general direction of the Contracting Officer and is subject to inspection by his appointed inspectors to insure strict compliance with the terms of the contract. • • • No inspector is authorized to change any provisions of the specifications without written authorization of the Contracting Officer, nor shall the presence or absence of an inspector relieve the Contractor from any requirement of the contract."

"2-17 *Placing Concrete* • • • •

a. Cold Weather Placement.

Concrete shall be mixed and placed only when the temperature is at least 40 degrees F and rising, unless

permission to pour is obtained from the Contracting Officer, in which event all material shall be heated and otherwise properly prepared so that batching and mixing can proceed in full accord with this specification. Irrespective of the temperature conditions at time of placing, suitable means shall be provided for maintaining the concrete at a temperature of at least 50 degrees F for a period of five (5) days after placing, and at a temperature above freezing for the remainder of the specified curing period. • • • • •"

"3-04 *Laying up Masonry.* No masonry shall be erected when the ambient temperature is below 32 degrees F in a rising temperature or below 40 degrees F on a falling temperature, or when there is probability of such a condition existing within 48 hours, unless special provisions are made for heating the materials and protecting the work. • • • • •"

"30-05. *Backfilling.* The trenches shall not be backfilled until all required tests are performed and until the utilities systems as installed conform to the requirements specified in the several sections covering the installation of water-distribution system. • • • •"

SECTION XXXI—*Water Lines; Supply and Distribution System.*

31-04 • • • •.

b. • • • •

(6) *Tests* after the pipe is laid, the joints completed, and the trench partially backfilled, leaving the joints exposed for examination, the newly laid piping • • • shall • • • unless otherwise specified, be subjected to a pressure test • • • where an actual visible inspection of each joint cannot be made because of the necessity for immediate backfilling • • • or other unforeseen condition develop • • • suitable means shall be provided by the Contractor for determining the quantity of water

lost by leakage under normal operating pressure. * * *. Pipe lines jointed with lead may be subjected to hydrostatic pressure, inspected and tested for leakage at any time after partial completion of the backfill."

"10-15 *Finish Floors* * * *

a. Flooring to be covered with asphalt tile or linoleum shall be * * * No. 2 * * * with all knotholes and loose knots cut out in laying."

11. Pertinent provisions of Supplemental Agreement No. 2 are as follows:

"*SC-14 Beneficial Occupancy.* The beneficial occupancy shall be understood *to mean a state of completion of structures and utilities thereto* which will permit installation of technical equipment in the technical buildings (Operations Building, Power House, and Radio Buildings (2)) minimum housing (1 barracks) and mess facilities by the Using Service without undue interference by the construction contractor; *heating plumbing, and electrical services shall be sufficiently complete to permit satisfactory operation of the structures afore listed;* all as determined by the Contracting Officer. Work such as finish grading, walks, drives, drainage structures, seeding, exterior painting and minor portions of interior painting, building gutters and toilet partitions need not necessarily be complete."

"In case of failure on the part of the Contractor *to make the structures and utilities available for beneficial occupancy* by 15 March 1951, the Contractor shall pay the Government as liquidated damages the sum of $100.00 for each calendar day delay *the structures and utilities* are not available for beneficial occupancy. * * *"

"Where temporary equipment installation is made in order to provide beneficial occupancy, a reasonable

length of time for installation of permanent equipment will be allowed the contractor at a later date as determined by the Contracting Officer." (Italics Supplied)

E. STATEMENT OF FACTS [1]

12. On the same date Notice to Proceed was issued, 30 August 1950 (Exhibit No. 1), the Appellant was advised that acceleration of certain portions of the work was desired to permit beneficial occupancy in advance of the contract completion time. He was requested to submit proposals for accelerated partial construction to the extent that Technical Buildings would be sufficiently completed to permit installation of equipment and that one (1) barracks would be available for occupancy together with mess facilities and with heating, plumbing, and electrical services sufficiently complete to permit satisfactory operations of the structures. Proposals were requested on the basis of buildings being made available for beneficial occupancy thirty, forty-five, sixty, and ninety days prior to the specified completion date. Appellant was further requested to detail items of work which would not be completed in each structure and the utility system (Exhibit No. 48). By letter of 27 September 1950 (Exhibit No. 49), a proposed increase of $331,830 for increased costs for accelerated completion ninety days prior to the contract completion date was submitted. This proposal was for all buildings covered by the contract (Exhibit No. 50).

13. In a conference in the Omaha District Office on 11 October 1950, Appellant was advised that the amount was too high, he promised to review the matter and to later telephone the District Office.

14. By letter dated 16 October 1950 (Exhibit No. 51), a proposal of $42,350 additional was submitted for making the

[1] Available facts specifically applicable to each item of Appellant's Claims (Exhibits Nos. 16 and 17) are contained in the Contracting Officer's decision of 2 October 1953 (Exhibit No. 18).

required buildings available ninety days prior to the contract completion time without utilities or any temporary facilities except temporary lights. Appellant maintained that, due to the unknown status of the water supply, he was pricing the items without utilities. Although records do not indicate, Appellant and or Resident Engineer apparently were notified by the District Office by telephone that the proposal without utilities was not acceptable.

15. On 17 October 1950 (Exhibit No. 52), the Resident Engineer telephoned the District Office and advised that Appellant intended to submit a revised proposal "for ninety days B.O. with utilities" of $114,752.00.

16. By letter of 17 October 1950 (Exhibit No. 53), the revised proposal of $114,752.00 additional was submitted for furnishing the accelerated partial completion required for beneficial occupancy ninety days prior to the contract completion time. No qualification was made in the letter with regard to the utilities. However, items were included in this proposal for the plumbing, heating, and electrical subcontractors. The revised proposal was incorporated into Supplemental Agreement No. 2 (Exhibit No. 2) dated 1 November 1950. The executed Supplemental Agreement was returned by the Appellant together with letter of 11 November 1950 (Exhibit No. 54).

17. On 27 November 1950 (Exhibit No. 50), Appellant called attention to the fact that his proposal of $114,752, which was accepted by the District Engineer, was based on beneficial occupancy with temporary electrical and heating facilities (Exhibit No. 52), because steel deliveries for the Central Heating Plant could not be completed in sufficient time. Appellant made no objection nor did he indicate that his proposal did not include permanent water lines, pump houses, water tank, or sewage facilities. He later alleged that his estimate for utilities covered by the beneficial occupancy agreement was to consist of Butane Gas Heat, water in pails, and temporary out-houses (Exhibit No. 17).

18. On 13 December 1950, the matter of Appellant's proposal and the negotiation notes for Supplemental Agreement No. 2 were reviewed and he was advised that the accepted proposal did not indicate in any way that temporary facilities were contemplated and that, if it had, the proposal would not have been acceptable (Exhibit No. 55). Appellant's attention was also called to the fact that the executed Supplemental Agreement (Exhibit No. 2) provided that "Heating, plumbing, and electrical services should be sufficiently complete to permit satisfactory operation of the buildings." Appellant did not protest this decision.

19. Appellant had not submitted the progress schedule required by specification paragraph 60-5 prior to 30 September 1950. The schedule was submitted between the 1st and 10th of October 1950 and was returned for revision. The revised schedule was resubmitted on 1 November 1950 (Exhibit No. 56). The submission of the progress chart was after the execution of the Supplemental Agreement No. 2 and individual items of the contract, as a whole, after the application of the Supplemental Agreement, were included in the progress schedule.

20. Attached is Exhibit No. 57,* "Excerpts from construction progress reports" and Exhibit 100, showing progress on each feature of work by months during the contract period. As of 30 November, 34.4% of the contract work, including Supplemental Agreement No. 2, was completed as against the scheduled 31.2%.

21. During the month of November 1950, average temperatures of the State of Missouri as a whole were 4.7° below normal. The average temperature recorded at or near the job site was 34.4° whereas the average temperature for forty-two years of record was 40.6° (80°-12b contract specifications). The temperature of 6.2° below normal at

* See Weather Data Chart, Exhibit 58.

the job site was more severe for the State as a whole. On the construction progress report for 30 November 1950, the Resident Engineer stated that work conditions were good (Exhibit No. 57). The report for 30 November 1950 further stated that Appellant was approximately 3% behind schedule on Technical Buildings.

22. During the month of December, 1950, approximately 12.7% of the entire work was completed; however, the contract as a whole was 2% ahead of schedule.

23. Between 20 and 30 December 1950 initial work was started on the water distribution system. This consisted of excavation for water lines (Exhibit No. 57). Only 5% of this work was completed by the end of December. On 7 December 1950 (Exhibit No. 59), the Resident Engineer requested Appellant to inform, in writing, what action was proposed to be taken to bring construction progress on Technical Buildings up to schedule. By letter dated 8 December 1950 (Exhibit No. 60), Appellant advised that the Carpenter crew was being built up to work six days a week, nine hours a day, as long as the weather permitted; that the bricklayers would work nine hours a day seven days a week; and that he was requesting additional carpenters to augment his present organization. As of this date, Appellant had not attributed delay, if any, to any particular cause nor had he requested extensions of time for any particular cause.

24. The record for December 1950 indicates that three inches of snow and below zero temperatures for five days between 1 and 10 December slowed progress to the extent that Appellant was able to utilize only 25% of his force for that period; that sub zero temperatures temporarily slowed progress for three or four days between 10 and 20 December but the extent of the delay was not indicated (Exhibit No. 57). The average temperatures for the State of Missouri as a whole for the month of December was 7.8° below normal. The average temperature for the month recorded

at or near the job site was 21.8° as compared with an average temperature of forty-two year record for December of 29.6° (SC-12*b*, contract specifications, Exhibit No. 58).

25. During January 1951, approximately 18.4% of the work was completed. As of 30 January 1955, 65.5% of all work was completed as against the scheduled 69.7%. Records for the month of January, as a whole, indicate that average temperature at or near the job site was 24.8° as against a forty-two year average of 24.8°. The temperatures were normal for that month. Excavation for water lines continued between 10 and 20 January (Exhibit No. 57). Between 1 and 10 January 1951, 800 feet of water line trench was excavated and one car of water pipe was being delayed (Exhibit No. 57). By 20 January 1951 however, all water line pipe had been delivered on the job and excavation for water trenches continued. Water distribution system was 50% complete at the end of January, 1951 (Exhibit No. 100). As of 31 January 1951, the status of the contract features was as follows:

Feature	Scheduled	Actual
Technical Buildings[1]	74%	65.5%
Accessory Buildings	55%	63.5%
Utilities	58%	54.9%
Roads, Grading, Walks, Fences, and Seeding	55%	83.1%
Contract, as a whole	59.7%	65.5%

[1] For beneficial occupancy under Supplemental Agreement No. 2.

Progress reports for the period ending 20 January 1951 indicate that Technical Buildings were approximately 4% behind schedule due to late delivery of material during October and November 1950. Under date of 31 January 1951, at the verbal order of the Resident Engineer, Appellant furnished a construction progress chart indicating actual percentages of completion of beneficial occupancy items only (Supplemental Agreement No. 2) as of 30 De-

cember 1950 and the anticipated percentages of completion for these items through 15 March 1951. The progress chart (Exhibit No. 61) was approved by the Resident Engineer on 31 January 1951. Ten-day progress reports were also kept in connection with this supplemental progress chart (Exhibit No. 62). Indicated value of "Necessary Utilities" shown on the beneficial occupancy chart was $181,526.00. The indicated value of the utilities on the progress chart submitted in October 1950 was $162,823.00. The increase in value may be attributed to additional work covered by modifications issued prior to 31 January 1951. The monetary value so ascribed in the beneficial occupancy chart showed that Appellant proposed to furnish permanent utilities for beneficial occupancy as outlined in Supplemental Agreement No. 2 and in accordance with the decision of 13 December 1950.

26. Prior to 31 January 1951, Appellant had not attributed delays in the progress of work to any particular cause nor had he requested extensions of time by reason of any particular cause. However, by letter of 24 January 1951 (Exhibit No. 63), he notified the Resident Engineer that he would request an extension of time for every day of delay after 15 March 1951 if Government-furnished tower material was not delivered on time (which is not herein pertinent).

27. By letter of 29 January 1951 (Exhibit No. 64), Appellant was notified that plans and specifications for the Central Heating Plant would be revised and he was told that before placing concrete on the roof, the Resident Engineer should be contacted for certain structural details. On 12 February 1951 (Exhibit No. 65), Appellant requested that an extension of time of 13 days for completion of the Central Heating Plant because he alleged that the Resident Engineer's letter of 29 January 1951 constituted a stop order on this phase of the work (Exhibit No. 64, supra.). On 20 February 1951 (Exhibit No. 66), Appellant was told

that no stop order on the Central Heating Plant work had been issued and that an extension of time was not considered justifiable. The changes directed in the 29 January 1951 letter were incorporated into Change Order No. 4 dated 28 May 1951 (Exhibit No. 67). No extension of time was allowed. Appellant accepted the modification without protest.

28. After an inspection of the contract work on 30 January 1951 and a review of the current progress reports, the Contracting Officer, by letter of 2 February 1951 (Exhibit No. 68), advised Appellant that certain features of the work covered by Supplemental Agreement No. 2 were behind schedule. He was further ordered to take immediate steps to double his forces or increase overtime operations, in accordance with specifications paragraph GC-5*b*, to attain the scheduled progress. His attention was called to the fact that the Technical Buildings were approximately 6% behind schedule and that overhead steam lines had not been commenced; Central Heating Plant equipment had not been installed; that only a small percentage of the water lines had been installed and tested; that underground water storage tank and water pumping equipment had not been installed, and that concrete work on the septic tank was only partially completed. All work covered by the Beneficial Occupancy Agreement was 65.5% completed on 31 January 1951 as against a scheduled 69.7% (Exhibit No. 61).

29. On 6 February 1951 (Exhibit No. 69), Appellant forwarded his comments with respect to the status of the progress on the features of work outlined in the Contracting Officers letter of 2 February 1951. Delay in the Central Heating Plant was attributed to an alleged hold order on the roof (Par. 27, *supra.*). Delay in installation of outside water lines was attributed to late delivery of valves and delay in approval of certain shop drawings for water valves, between 6 November 1950 and 18 December 1950,[1] and delay

[1] See Exhibit No. 18, page 4, and Exhibits Nos. 70 and 71.

in delivery of certain pipe fittings. No specific delay was alleged in connection with the construction of the underground water storage tank. The delay in construction of the pumphouse and equipment was attributed to notice in the change in construction of the floor which had not been detailed as of that time. With regard to the concrete work on the septic tank, no specific factor of delay was alleged. Appellant further contended that delay in general was attributed to the fact that he had not negotiated Supplemental Agreement No. 2 with the intent of providing permanent utilities for beneficial occupancy. Delays in the progress of the work were not attributed to unusually severe weather. No extensions of time, other than that covered by the alleged stop order on the Central Heating Plant, were specifically requested for any particular cause. Appellant further stated, "As the record will show, we have not until now asked for any extension of time." By letter of 12 February 1951 (Exhibit No. 75), Appellant requested a 13-day time extension because of the alleged stop order on the Heating Plant roof. The extension was denied by letter of 20 February 1951 (Exhibit No. 76). Change Orders Nos. 1 (Exhibit No. 72), 4 (Exhibit No. 67), 10 (Exhibit No. 73), and 11 (Exhibit No. 74) covered the changes in design in the steam system, power house, pumphouse, wells, and outside water system. No additional time was allowed in the modifications. Appellant signed and accepted the modifications without protest.

30. By telegram of 20 February 1951, Contracting Officer again ordered Appellant to institute double shift operations on the Technical Building and Utility Facilities because inspection between 2 and 20 February 1951 showed progress on these items to be unsatisfactory to meet March 15 completion date (Exhibit No. 77). Appellant was not ordered to accelerate construction of the Accessory Buildings (Barracks, BOQ and two BQ's, or Supply & Adm. Building). As of 28 February 1951, construction of Technical Buildings was 11.1% behind schedule and Utilities were 9% behind

schedule. Accessory Buildings were 7.3% ahead of schedule (Exhibit No. 78). The contract, as a whole, was 5.2% ahead of schedule.

31. As of that date, the Supply, Administration, and Recreation Building was 55% complete as against a scheduled 67%. The Bachelor Officers Quarters were 35% as against a scheduled 67%. The two Bachelor Quarters (Buildings 6c and d) were approximately 88% complete as against a scheduled 67%[1] (Exhibits Nos. 79 and 78).

32. The average temperature at the job site during the month of February 1951 was 28.7°, as opposed to a recorded average of forty-two years of 27.1°. Temperatures for the month of February were considered above normal. Between 1 and 20 February 1951, Appellant laid one thousand feet of water line; this feature of the work continued through 28 February 1951 (Exhibit No. 57). Only 10.7% of the work was accomplished during February. No work was performed this month on the BOQ or the Supply, Administration, and Recreation Buildings (Accessory Buildings). However, Appellant was permitted to test water lines with air. Certain trenches were approved for backfilling (see Exhibit No. 17). Tests on water lines were commenced on 18 February 1951 and were completed on 15 March 1951.

33. Average temperatures for the month of March at or near the job site were 33.2° as compared with a forty-two year average of 39.7°. During the early part of March, weather conditions were described as good (Exhibit No. 57). All water lines necessary for beneficial occupancy and temporary steam lines were completed by 10 March 1951. All work required for Beneficial Occupancy was accepted on 19 March 1951 (Exhibit No. 4). Delay in acceptance of work required for beneficial occupancy was due to nonarrival of

[1] One barracks was covered by Supplemental Agreement No. 2 and was scheduled to be 90% complete as of 28 February 1951.

certain equipment on the job site. Testing of equipment in Operations Building started on approximately 10 March but testing could not be completed until all equipment was received and installed. The equipment arrived in time so that it could be installed and testing completed by 19 March. The delay in completion of the Power Building was due to non-delivery of Government-furnished generators. For this reason, the requirement that the building be completed prior to the dates set for beneficial occupancy was waived (Exhibits No. 80 and 81). The waiver was incorporated into Change Order No. 5 dated 13 March 1951 (Exhibit No. 82). This Change Order was signed without protest. On 19 March 1951, the Heating Plant was only approximately 80% complete (Exhibit No. 100). For this reason, Appellant was allowed to connect temporary heating lines for the buildings. The reason that the buildings were not completed was that Appellant had not proceeded with the installation of boilers prior to roofing the building.

34. The temperatures for the months of November and December 1950 and March 1951 were below the recorded normal whereas temperatures for the months of January and February 1951 were below or normal. In the supplement (Exhibit No. 46), Appellant has listed recorded temperatures for each day of the claimed delay. However, the listed readings were taken from both the Kirksville CAA Station and Kirksville, Missouri proper,[1] and temperatures listed for March 1951 appear to be in error.[2] Additional facts occurring prior to 15 March 1951 are outlined in the Contracting Officer's decision of 2 October 1953 (Exhibit No. 18).

---

[1] February 1951 temperatures were taken from readings made at the CAA Station whereas temperatures for December 1950 were taken from readings at Kirksville proper.

[2] Recorded high-low temperatures for 3 March 1951 at the Kirksville CAA Station were 35° and 20°. For Kirksville, Missouri, the temperatures were 33° and 14°. Appellant shows a high of 71° and a low of 52° for that same date.

35. On 29 May 1951, Appellant's attention was called to the fact that, as of 20 May 1951, 92.3% progress was completed as against a schedule 95.1%. He was requested to notify the District Office immediately of the steps that would be taken to put the job on schedule (Exhibit No. 83). There is no record of a reply having been made to this telegram.

36. Additional troops in excess of the number contemplated for initial Beneficial Occupancy occupied the station during the latter part of April 1951. Records indicating the arrival date, the number of troops, and the buildings which were occupied are not available. It was alleged that because of the additional troops occupying the Station early in April, Appellant was ordered by the Resident Engineer to fire the boiler to provide heat for the troops (Exhibit No. 46). In the supplement to the claim (Exhibit No. 17), Appellant stated, "We have submitted in our claim the labor for firing of temporary boilers with our men (not subcontractors) 24 hours per day, 7 days per week • • •." The claimed amount was $796.00 plus 10% overhead and 10% profit. In the second supplement (Exhibit No. 46), costs of $5,841.36 plus 35% overhead and 10% profit were alleged to be "Amounts paid to J. Louis Crum (mechanical subcontractor) for firing boilers for temporary heating." Initial request for adjustment was by letter of 11 May 1953 (Exhibit No. 16). Contracting Officer was unable to determine whether such an order was necessary or may have been given; the specific buildings which were heated; whether they were occupied by troops or under the state of partial completion; or the period of time the buildings may have been heated. (Also see Exhibit No. 12.) However, during the period 17 March 1951 thru May 1951, Appellant purchased and delivered coal to the Using Service for firing boilers to provide heat during the period March 17, 1951, thru 29 May 1951 (Exhibits Nos. 103 and 104). Payment of an additional $563.04 was covered in Change Order No. 9 which was not protested.

37. Appellant claimed additional costs for carpenter and painter maintenance labor allegedly necessary to recondition premises damaged by troops. Appellant estimated that all paint and carpenter work performed after 15 June 1951 was compensable because original work by these trades was substantially complete by that time. Available records indicate that subsequent to 18 June 1951 painters applied the first coat to the East Barracks Building and the Heating Plant; that interior prime coat was placed in the Heating Plant; the Tower and Steam Line Brackets were painted. After 18 June 1951, available records further indicate that carpenters formed for sidewalks commenced placing of finish and trimming the Barracks; set and framed poles for the steam line and posts on the parking lots and, formed for outlets and tunnels. On 1, 2, 3, 4, 6, and 7 August 1951 painters repainted and cleaned up paint work and revarnished drawers and doors in the Barracks and that on 3 August 1951 carpenters were adjusting doors and overhauling drawers of Barracks No. 1 (Exhibit 84, Excerpts from Inspector's Logs). By letters of 19 September 1951 (Exhibits Nos. 85 and 86), Appellant claimed an additional $450.64 for refitting closet doors and for certain repair work in the Operations Building and Barracks. It was alleged that this work was necessary to correct abuses done by others. Appellant's claim was denied 18 October 1951 (Exhibit No. 87) because the repairs were deemed to poor workmanship or to swelling and warping caused by dampness. Appellant did not protest nor did he appeal from this decision. Repainting of Bachelor Quarter walls and ceilings was covered in Change Order No. 12 (Exhibit No. 88) as outlined in Appellant's proposal of 9 April 1951 (Exhibit No. 89). The repainting was due to deficiencies in workmanship (Exhibits Nos. 101 and 102).

38. By letter of 14 June 1951 (Exhibit No. 90), Appellant requested an extension of time due to causes allegedly occurring between 1 March 1951 and 14 June 1951, including "excessive precipitation" humidity and temperature con-

ditions in general, and late delivery of Government-furnished generators and switchgear to be installed in the Powerhouse. CAA Records of weather prevailing at the site were also furnished (Exhibit No. 91). Change Order No. 8 (Exhibit No. 92) was issued on 25 June 1951 which extended the 15 June 1951 completion date 38 calendar days because of the delay and delivery of Government-furnished equipment. On 21 July 1951 Appellant protested the modification because it did not consider the delays outlined in his 14 June 1951 letter (Exhibit No. 93). Appellant pointed out that the CAA weather records indicated that for 90 days prior to 1 July 1951 there had been approximately 51 days of rain which allegedly created an abnormal ground condition. Additional time extension of 68 days was requested.

39. On 11 August 1951 (Exhibit No. 94), Appellant accordingly returned Modification No. 8 unsigned. As a consequence of Appellant's protest, revised Modification No. 8 (Exhibit No. 3) which provided for an Extension of 98 calendar days, was issued. This modification further specifically provided that "Beneficial Accupancy completion remains unchanged." The 98 days was predicated on unusually severe weather 22 days in March, 21 days in April, 8 days in May, and 17 days in June 1951 as well as 30 days for completion of seeding which work was dependent upon completion of site grading. Appellant signed and returned the revised modification without protest. The contract work was completed within the contract time as extended. Although the extension was based on 22 days of unusually severe weather during March 1951, it was not made applicable to that portion of the work designated for partial completion to meet Beneficial Occupancy requirements by 15 March 1951. Assessment of 4 days liquidated damages (15-19 March 1951) for delay in the partial completion was not protested.

40. Throughout the period August thru November 1951, Appellant was urged to expedite processing of all outstand-

ing claims in order to close out the contract (Exhibits Nos. 95, 96, 97, and 98). Although Appellant was fully cognizant of the 30-day provisions of Article 3 (Exhibit No. 99), the items outlined in paragraph 4 *supra*, were not brought to the attention of the Contracting Officer until February 1953 or approximately 1½ years after completion of all work.

41. The Contracting Officer cannot ascertain when flooring was installed; whether an order to cut out all knots from the flooring was necessary or may have been given; whether Appellant actually performed the changed work as alleged or whether the changed work as actually performed, if any, occasioned additional costs.

F. Conclusions

42. a. Appellant did not promptly notify the Contracting Officer in writing of the causes of any delay due to unusually severe weather which may have prevailed during the period November 1950 to March 1951.

b. Because of Appellant's failure to give prompt notification of the causes of the delay, the Contracting Officer's ability to ascertain the facts, the extent of such delay, if any, and the impact the alleged delay may have had on the contract work and the cost of its performance, has been jeopardized.

c. Change Order No. 8 which provided that "Beneficial Occupancy completion remains unchanged" was a final decision with respect to extensions of time for any delay which may have occurred before 15 March 1951 and the Contracting Officer is without authority to consider matters covered by that modification.

d. Even though the Resident Engineer may have advised the Appellant that no extensions of time would be granted, he had no authority under the contract to change its terms.

e. Assuming that Appellant incurred extra costs because of the Government's failure to allow appropriate extensions of time, the claim is one for damages which the Contracting Officer does not have authority to consider under the administrative procedures provided in the contract.

f. Assuming that the Contracting Officer may have given an order that no extensions of time would be granted and that said order constituted a "change or extra" under Article 3, Appellant did not assert a claim for an adjustment under that Article in writing within thirty days from the date the alleged extra or change may have been ordered.

g. Appellant was not ordered in writing to accelerate construction of the Bachelor Officers Quarters, Two Bachelor Quarters Buildings, and Supply and Administration Building; Water Lines; Water Tank; Pumphouse; Central Heating Plant; Sewers; Steam Lines; and Road Grading which were not covered by Supplemental Agreement No. 2, in order to provide Beneficial Occupancy for additional troops above the number contemplated by Supplemental Agreement No. 2.

h. If such orders may have been given, either verbally or in writing, Appellant did not request adjustment of the contract price within thirty days from the date the orders may have been given.

i. Appellant was not ordered in writing to perform extra maintenance work, extra carpenter and painter maintenance work, to furnish temporary heat for troops prior to completion, to repair roads alleged to have been damaged by Government vehicles and other contractors or to remove knots and shakes from flooring installed under asphalt tile.

j. If such orders may have been given, either in writing or verbally, Appellant did not request adjustment of the contract price within thirty days from the date the orders may have been given.

(NOTE: With respect to the claims for Item V: Acts of the Government in Failing to make Water Supply Available; VII Extra Work in Construction of Interior Bearing Partitions Contrary to Plans and Specifications; and VIII Miscellaneous Extract Electrical Work, which have been omitted from the Supplement (Exhibit No. 46) but were included in the claim of 11 May 1953 (Exhibit No. 16) the conclusions of the Contracting Officer are outlined in the decision of 2 October 1953 (Exhibit No. 18).

k. Because of Appellant's failure to assert claims in writing within the 30-day period specified in Article 3 and his laches in not asserting them until approximately a year and a half after completion of all the contract work, the Contracting Officer's ability to investigate and determine whether or not such alleged changed or extra work may have been ordered, or was necessary, whether or not such extra or changed work, if any may have actually been performed and whether or not such changed or extra work may have increased the contract price, has been impaired.

l. Because of the above, it is recommended the entire claimed additional amount of $272,063.07 be denied.

/s ANTHONY FLEMING
Anthony Fleming
Colonel, Corps of Engineers
Assistant District Engineer
Contracting Officer

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
Washington 25, D. C.

(SEAL) In reply refer to

Before the
Corps of Engineers Claims and Appeals Board

APPEAL OF
JOHN V. BOLAND CONSTRUCTION COMPANY

Under Contract No. DA-25-066-eng-480

Eng C & A Board
Decision No. 1094

Both parties appeared and produced testimony at a formal hearing and the entire record having been considered on the premises, this Board finds as set forth hereinafter. The appeal was timely taken and this Board is the intermediate appellate authority designated in Article 6 of the contract.

Contract No. DA-25-066-eng-480 for construction of weather station P-64 was awarded to appellant on 17 August 1950. Acknowledgement of receipt of notice to proceed on 1 September 1950 established 13 June 1951 as the completion date which provided a 285 calendar day performance period. The principal features of the work included one tower; one operations building; one power building including installation of equipment; one heating plant including equipment; two radio station buildings; three bachelors' quarters, (32 man); one bachelor officers' quarters; one mess hall (90 man); one supply, administration and recreation building; gate-house; maintenance building; water supply and sewage disposal system; water, sewer, steam and electrical distribution systems; and access roads, grading, walks, fences and fuel storage. Shortly after award the contracting officer sought and subsequently

obtained an agreement with the contractor that beneficial occupancy of certain buildings and facilities would be provided 90 days prior to the contract completion date, to wit: on 15 March 1951. For such advance in the beneficial occupancy the Government agreed to pay the sum of $114,752.00. The contractor alleges that thereafter he was beset with many difficulties including delays resulting from unusually severe weather, delays in receiving necessary equipment or material, arbitrary orders by the contracting officer, his representatives and others and damages to the completed and partially completed work as a result of occupancy by troops prior to completion. Beneficial occupancy under Supplemental Agreement No. 2 was accepted on 19 March 1951 (four days late and four days' liquidated damages were assessed at $100.00 per day). All of the contract work was accepted as complete as of 10 September 1951, which after granting time extensions, was timely completion. The appeal is based upon allegations that the contracting officer failed or refused to give appropriate extensions of time on both the beneficial occupancy part of the work and the remainder of the work, thereby accelerating completion; required completed utilities to the buildings to which advanced beneficial occupancy applied contrary to Supplemental Agreement No. 2; took beneficial occupancy of buildings and facilities in addition to those provided in Supplemental Agreement No. 2 and that the overall beneficial occupancy caused appellant additional expenses of rebuilding, repairing and maintenance of buildings and roads as well as the expense of furnishing labor to heat the buildings, and that Government job representatives required flooring standards in excess of the specification requirements.

The pertinent contractual provisions are as follows:

"ARTICLE 5. *Delays-Damages.*—(c) Time Extensions. The right of the Contractor to proceed shall not be

terminated as provided in this article, nor the Contractor charged with liquidated or actual damages, because of any delays in the completion of the work due to causes which he could not reasonably have anticipated and which were due to causes beyond his control and without his fault or negligence, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, either in its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargo, and unusually severe weather, or delays of subcontractors due to such causes: provided however, that the Contractor shall promptly notify the Contracting Officer in writing of the causes of such delay. Upon receipt of such notification the Contracting Officer shall ascertain the facts and the extent of such delay and, if in his judgment the facts so justify, shall extend the time for completing the work commensurate with the period of excusable delay. The Contracting Officer's findings of fact thereon shall constitute his decision which shall be final and conclusive on the parties hereto subject to appeal by the contractor within thirty (30) days therefrom as provided in the 'Disputes' Article herein."

"*GC-5. Progress Charts, and Requirements for Overtime Work.*

"*b.* The Contractor shall furnish sufficient forces, construction plant and equipment, and shall work such hours, including night shifts and overtime operations, as may be necessary to insure the prosecution of the work in accordance with the approved progress schedule. If, in the opinion of the Contracting Officer, the Contractor falls behind the progress schedule, the Contractor shall take such steps as may be necessary

to improve his progress and the Contracting Officer may require him to increase the number of shifts, and or overtime operations, days of work except Saturdays, Sundays and holidays, and or the amount of construction plant, all without additional cost to the Government. Provided, that the provisions of this paragraph shall not be construed as prohibiting work by the Contractor if he so elects on Saturdays, Sundays, or holidays."

"*(C) 10. Possession Prior to Completion.* The Government shall have the right to take possession of or use any completed or partially completed part of the work. Such possession or use shall not be deemed an acceptance of any work not completed in accordance with the contract. If such prior possession or use by the Government delays the progress of the work or causes additional expenses to the Contractor, an equitable adjustment in the contract price and or the time of completion will be made and the contract shall be modified in writing accordingly.

"*10-13.- Finish Floors.*

"*a.* Flooring to be covered with asphalt tile or linoleum shall be 25/32-inch by 2 3/4 or 3 1/4-inch face, tongued-and-grooved, No. 2 Idaho white pine, ponderosa pine, sugar pine, inland region Douglas fir, or larch, or Grade D coast region Douglas fir, west coast hemlock, Sitka spruce or southern pine, with all knotholes and loose knots cut out in laying."

The various items of the appeal as quoted from the findings of fact dated 28 May 1956 are as follows:

"A. Extra labor, insurance, taxes, material and miscellaneous costs alleged to have been incurred during a 60 day period of weather claimed to have been unusually severe between the date of the contract and 19 March 1951

(1) Extra labor on buildings designated for accelerated beneficial occupancy	$34,208.89*	
(2) Extra labor on buildings other than those designated for accelerated beneficial occupancy	11,943.77*	
(3) Extra labor involved in making heating, plumbing and electrical services sufficiently complete to commence satisfactory operation	23,694.11*	
Total	$69,846.77	
Insurance and Taxes @ 14.72%	10,281.44	
		$80,128.21
(4) Extra material and miscellaneous costs incidental to claimed accelerated completion including extra equipment rental costs		64,201.91

*The charges claimed for extra material and miscellaneous costs apply to both facilities designated for accelerated beneficial occupancy and balance of facilities

because appellant claims that such costs can not readily be allocated between work on the supplemental agreement facilities and other work performed during the said 60 days.)

Appellant claims that extra labor costs are based on an estimate that a given expenditure of manpower on the 60 alleged inclement days produced only 15% of the progress towards completion of the work that the same amount of manpower would have produced on a normal day.

"B. Extra costs alleged to have been due to performing work on water lines to make water available for beneficial occupancy	16,034.93
"C. Alleged extra maintenance costs claimed to have been due to occupancy of facilities by troops before the contract completion date	11,143.30
"D. Extra costs of repairing roads alleged to have been due to extensive use of the roads prior to surfacing	6,007.58
"E. Extra costs claimed because of an alleged requirement of removing all knots and shakes from flooring	5,691.52
Total	$183,207.45
Overhead on excess costs 35%	64,122.61
	$247,330.06
10% Profit	24,733.01
GRAND TOTAL	$272,063.07"

Since appellant has accepted paragraphs 1 through 5 of the Findings of Fact by the contracting officer dated 28 May 1956 (Tr., p. 5), the items of appeal will be referred to and discussed in the same order as listed above.

Appeal Items A (1), (2) & (4)

Appellant claims entitlement to additional costs under Article 3 for what is termed "extras" allegedly caused by certain acts of the Government in ordering acceleration of work at a time when appellant should have been granted an extension of time resulting in appellant having to perform work on 60 days on which unusually severe weather prevailed during the months of November and December 1950 and January, February and March 1951 (Tab 46, Appeal Assembly). The amount claimed for Item A (1), (2) and (4) is based on an estimate that a given expenditure of manpower on the 60 days produced only 15 per cent of the progress toward completion of the work that the same amount of manpower would have produced on a normal day. The Government defends on the basis that the weather complained of was not more severe than could have been reasonably anticipated and if it was, appellant failed to file prompt written notice of delays and requests for time extensions. Also, that appellant did not protest or file timely claims regarding any order for acceleration or extra work.

To clarify the record, appellant's claim for having to work on the 60 days extends to both the work under Supplemental Agreement No. 2 and the remaining contract work, which was being performed simultaneously. Going to the actions of the parties, appellant admits that he did not give prompt written notice of the alleged delays (Tr., p. 124) and did not protest in writing any order for acceleration or extra work (Tr., p. 250). No contractual claim was made in writing on these controverted matters until 11 May 1953, which was well after the final acceptance of the contract work on 19 September 1951. Appellant seeks to justify his failure to make prompt written requests for extensions of time because he was told (orally) repeatedly that no time extensions would be granted and that he was threatened with termination of his right to proceed if he shut the job down.

Although much argument has been presented by both parties as to the point of whether unusually severe weather prevailed and such delayed appellant; we think that it is unnecessary to inquire into this factor since the decision must turn on another point. In this connection it has been repeatedly held that before appellant is entitled to the administrative relief requested he must have followed the procedure as set forth in the contract. This appellant has not done. He did not request extensions although he now wants to be paid for having worked on days on which he may have been entitled to an extension of time. We cannot say that the contracting officer was acting arbitrarily when he ordered appellant to double shift and or work over time to bring the work up to schedule in order to meet the beneficial occupancy date for the Supplemental Agreement No. 2 work, since he had no request for an extension of time on which he could have acted. At least when such order was received appellant was contractually bound, if he felt himself wrongfully ordered to perform extra work, to either protest such order or make claim therefor within 30 days.

The contracting officer denied appellants claim items for neglecting to give prompt written notice of delays; for failure to protest or appeal from orders to expedite the work; and for his tardiness of more than two years in presenting claims, which delay he found was prejudicial to the Government in that it precluded proper investigation of conditions and facts which could have protected the Government's interests. Appellant has not furnished evidence which refutes the contracting officers position.

Appeal Items A (d)(2) and (4) are dismissed for failure of appellant to give prompt written notice to the contracting officer of delays and for his failure to timely protest a written acceleration order or file claim thereon for such an extended period thereafter. *Plumley vs. U.S.*, 226 U.S. 545; 33 S.Ct.Rep. 139; *Ross Engineering*

Co., Inc. vs. *U.S.*, 118 Ct.Cls. 527; *Dunnigan Construction Company, et al* vs. *U.S.*, 122 Ct.Cls. 262; *J. A. Ross and Co.* vs. *U.S.*, 126 Ct.Cls. 329.

APPEAL ITEM A (3)

This item concerns a dispute under the requirements of Supplemental Agreement No. 2 quoted in pertinent parts as follows:

"*SC-1A. Beneficial Occupancy.* The beneficial occupancy shall be understood to mean *a state of completion of structures and utilities thereto* which will permit installation of technical equipment in the technical buildings [Operations Building, Power House, and Radio Buildings (2)], minimum housing (1 barracks) and mess facilities by the Using Service without undue interference by the construction contractor; *heating, plumbing and electric services shall be sufficiently complete to permit satisfactory operation of the structures afore listed;* all as determined by the Contracting Officer. Work such as finish grading, walks, drives, drainage structures, seeding, exterior painting and minor portions of interior painting, building gutters and toilet partitions need not necessarily be complete." (Italic supplied)

"In case of failure on the part of the Contractor *to make the structures and utilities available for beneficial occupancy* by 15 March 1951, the Contractor shall pay the Government as liquidated damages, the sum of $100.00 for each calendar day until the structures and utilities are available for beneficial occupancy. The Contractor shall pay the specified liquidated damages either for delay in beneficial occupancy or delay in completion or both, as applicable." (Italic supplied)

"Where temporary equipment installation is made in order to provide beneficial occupancy, a reasonable length of time for installation of permanent equip-

ment will be allowed the contractor at a later date as determined by the Contracting Officer."

This controversy arose soon after execution of Supplemental Agreement No. 2 when appellant, while visiting the District office, was advised that the buildings for beneficial occupancy were to be complete including utilities. Appellants superintendent, who negotiated the Supplemental Agreement by letter dated 27 November 1950 to the District office, objected to the above interpretation of the Supplemental Agreement and advised that appellant's figure of $114,752 was based on beneficial occupancy, with temporary electricity and heat, although it appeared that the lighting would be complete by 15 March 1951 (Ap. Rec., Ex. 50). The Government replied by letter dated 13 December 1950 advising that the employment of temporary facilities (electric and heat) did not comply with the intent of the Agreement (Ap. Rec., Ex. 55). Thereafter, appellant installed and constructed permanent type utilities to the buildings under Supplemental Agreement No. 2. Although the matter was later mentioned by appellant, he did not protest further or file a contractual claim thereon until 11 May 1953 (Ap. Rec., Ex. 16), as supplemented by letter 25 August 1953 (Ap. Rec., Ex. 17), and as revised by letter dated 16 April 1955 (Ap. Rec., Ex. 46).

In his claim letter of 25 August 1953, appellant asserted that his estimate for beneficial occupancy was prepared on the basis of furnishing temporary utilities consisting of butane gas heat, water in pails, and temporary outhouses. He later alleged that he intended to install water pipe on the surface protected by straw and earth. It is noted that appellant and his superintendent differ as to what appellant proposed to furnish in the way of utilities (Trans., pp. 197-198). It would appear from the record that initially the dispute concerned heating and electrical utilities but has now been expanded by appellant to include all utilities pertaining to the buildings under

Supplemental Agreement No. 2. It is interesting to note that appellant's revised progress schedule (Gov. Ex. B) submitted and approved on 7 November 1950, which was after execution of the Supplemental Agreement and before the dispute arose shows all utilities under the entire contract to be approximately seventy-five per cent (75%) complete on 15 March 1951.

The record is not sufficiently clear to determine precisely what appellant actually intended to furnish in the way of utilities for the buildings involved. However, there is no question but that water in pails, temporary outhouses and such substitute facilities would not suffice under the requirements of Supplemental Agreement No. 2. This appeal item must be denied because appellant has not sustained his burden of proof as to what utilities he intended to furnish and that such would have met the requirements of Supplemental Agreement No. 2. On the contrary appellant attempted in his proof to show that temporary utilities would have sufficed to serve the buildings designated for beneficial occupancy. As viewed by this Board, Supplemental Agreement No. 2 did not change (either add to or take away) any of the basic contract requirements other than providing that appellant would furnish for beneficial use certain facilities in a shorter period of time, with the additional provision for use of temporary equipment where permanent equipment was not available. Also, it must be borne in mind that the basic contract work not accelerated by the Supplemental Agreement was being performed simultaneously with the Supplemental Agreement No. 2 work. In other words, apparently permanent utilities were being constructed at the time appellant allegedly wanted to construct temporary utilities.

Although this appeal item is denied for the reasons noted above, it could be dismissed for appellant's failure to protest an order for permanent utilities or file

a claim thereon in a timely manner as required by the contract. There is little doubt that such failure of appellant to notify the Government of claim was prejudicial in that it did not have the timely opportunity to record events and costs, preserve testimony and proof, act to avert or mitigate the costs and consequences or otherwise protect its interests.

Appeal Item A (3) is denied.

APPEAL ITEM B

Appellant alleges that he sustained additional costs due to delay in backfilling water lines and that such delay was caused by acts of the Government (Appeal Record, Ex. 46). Appellant attributes delay in completing the water line and backfilling the trenches to delayed approval of certain shop drawings for valves and testing of the water line by the Government. The contracting officer found that the period of time within which the Government returned the drawings in question to the contractor was not unreasonable and the delay, if any, was that which could have been reasonably anticipated by the contractor.

Although this Appeal Item is related to the preceding item, in that appellant asserts that the water line should no have been required at the time it was installed because he was entitled to substitute a temporary facility for beneficial occupancy, the question for consideration here is whether there were delays attributable to acts of the Government.

To be entitled to recover even for an extension of time appellant would have to show that completion of the work in question was delayed by acts of the Government and the extent of such delay. Since completion, including testing and backfilling, of the water line was dependent upon receipt and installation of valves, it becomes important to ascertain whether the water line was completed on time for beneficial occupancy. The evidence establishes

that although excavation for the water lines had begun in mid December 1950, that such continued through January 1951. It also shows that as of January 1951 the water pipe had been received on the project, and that the water line was installed and tested by 10 March 1951. From this it is apparent that there could have been little, if any, delays to the completion of the job from late delivery of valves since the water line was complete and tested and backfill begun before the beneficial occupancy date of 15 March 1951 (Tr., pp. 80, 298-302).

It is our decision that appellant has failed to show delay in testing and backfilling water lines, which could be attributable to acts of the Government. It is noted also that appellant did not request an extension of time for these alleged delays. Appeal Item B is denied.

APPEAL ITEM C

This item is based on the allegations that appellant incurred certain costs by reason of damage caused by others during beneficial occupancy of the whole job, prior to completion. It is alleged that extra painting and carpentry work was done on buildings damaged by troops and that appellant was required to furnish workmen to fire boilers for heating the troop occupied buildings and facilities. The Government defends this on the basis that the painting and carpentry work performed by appellant was in the nature of correcting deficiencies caused by poor workmanship and finishing uncompleted portions of the contract work, and that appellant did not furnish workmen to fire the boilers for beneficial occupancy.

The evidence establishes that the using service had moved in and occupied all of the buildings and facilities by 15 June 1951 (Trans., p. 83), notwithstanding such were not complete in their entirety. Although the painting and carpentry portion of this item would be cognizable by the contracting officer under paragraph 6C-10 if otherwise proper we feel that in view of the entire record the paint-

ing and carpentry portion must be denied because appellant has failed to produce adequate evidence in support thereof. In this connection the amount claimed by appellant for painting and carpentry work close approximates his total payrolls for the period in question. Although appellant has done little more than make allegations, the Government has shown that much of the painting and carpentry work after beneficial occupancy consisted of remaining contract work that had not been performed. The Government has also shown that some of the painting and carpentry labor consisted of correcting deficiencies resulting from poor workmanship. Appellant has not given the details where the painting and carpentry was done or proved that such was done because of damage by troops. Certainly a mere showing that a certain amount of money was spent does not sustain appellant's full burden.

Also, as to the heating portion of this item, appellant has failed in his proof to show that the extra work of firing boilers was required by Government representatives or that such was even performed by the contractor. Appellant had no contractual obligation to furnish this type of service except what heating he would have to provide for construction purposes, and if he was ordered to perform extra work he had a duty to protest such order or file a claim thereon within 30 days. This, he did not do. Accordingly, Appeal Item C is denied for the above reasons.

APPEAL ITEM D

This item is for costs incurred by appellant by reason of repairing certain roads and or areas which were allegedly damaged prior to final surfacing by traffic during beneficial occupancy. Appellants asserts that the repairs to the pump house road, the coal storage yard, administration building parking lot and the maintenance building road were occasioned by the damage caused by the possession and use by the Government under the beneficial occupancy provisions of the contract. The Government de-

fends on the basis that most of the damage was caused by heavy rains coupled with general use by everyone concerned including appellant. We think that the evidence clearly establishes that, with the exception of the pump house road, the roads and areas in question were used generally by everyone concerned. The Government admits that most of the damage to the pump house road was caused by water trucks hauling water for base use (Tr., p. 329). We think also that it is well established that such general use together with the heavy rains and inclement weather caused the damage complained of. We are not convinced that the rains and weather, absent use, would have damaged the roads to a great extent. There can be little doubt that use was the primary factor causing the damage. In this connection it requires no mean degree of imaginative prowess to visualize the results of use of the roads and areas during the rainy weather.

The remaining question is whether appellant should be recompensed for the work performed in repairing the damage and if so, to what extent? That such would fall under Specification Paragraph GC-10, which contains no time limitation for the contractor to assert a claim for additional expenses and/or time extension, there is no doubt. Notwithstanding the latter, the Government asserts that appellant has forfeited, waived or estopped himself from successfully pressing a claim for such damage in that the passage of such a considerable period of time in asserting his right to recovery has prejudiced the Government by obscuring the elements of proof. It cites the *Maxan Dress Corporation* Case, 126 Ct. Cls. 434, as precedent for invoking the doctrine of latches. We do not consider that latches is for application in the instant case. In this connection Specification Paragraph GC-10 does not impose a greater duty upon appellant in asserting entitlement than upon the contracting officer in making an equitable adjustment for damage arising out of the possession or use of the facilities by the Government. The Gov-

ernment readily admits now that its use of the pump house road necessitated substantially all of the repairs made. Therefore, we can but wonder why it did not acknowledge such at the time of occurrence. The latter is not to say that the contracting officer must, where he is not aware or does not acknowledge liability, come forward in the absence of an assertion of right from the contractor. However, we feel here the Government was or should have been aware of its obligation at the time of occurrence and we fail to see how it can now claim prejudice by the passage of time.

The proof presented at the hearing is somewhat lacking as to the degree of use of the coal storage yard, administration building parking lot and the maintenance building road by the contractor and the Government, respectively; however, we think that the weight of the evidence shows that since appellant was so near the completion of the entire contract that the light loads that would have been hauled by him had little adverse affect or contributed to any large degree of damage to the roads. However, we must hold that the damage contributed by the weather and appellant's use must be borne by appellant.

Accordingly, it is our decision that this item be allowed and that the matter be remanded to the contracting officer for further negotiations and determination of an equitable adjustment in accordance with Specification Paragraph 60-10.

APPEAL ITEM E

This item deals with whether appellant was required to produce higher quality floors than called for in the specifications and if so, is he now entitled to be reimbursed therefor? Specification Paragraph 10-15a specifies that all knot holes and loose knots be cut out of the wooden flooring to be covered with asphalt tile or linoleum. Appellant alleges that he was required to cut out all knots and shakes out of the flooring, which resulted in a clear floor;

the Government denies that all knots were cut out of the flooring.

Although the proof offered by both parties is lacking this item may be disposed of without inquiry as to proof. In this connection the contracting officer found that appellant did not assert the claim for over two years from the date the order, if any, was given and that such delay jeopardized the contracting officers ability to investigate and determine whether or not the flooring installed was superior in quality to that called for in specifications. The record shows that appellant first asserted a claim for this item in his letter of 11 May 1953. In view of this, the Board must dismiss this item of appeal for failure of appellant to follow his administrative remedies as set forth in the contract by protesting or filing a claim within 30 days from the time extra work was ordered.

Date: 10 June 1958

/s/ Edward E. Carriere
EDWARD E. CARRIERE
Member of the Board

I concur

/s/ Herbert H. Rice
HERBERT H. RICE
Member of the Board

I concur

/s/ E. Manning Seltzer
E. MANNING SELTZER
Chairman of the Board

I certify that the foregoing is a true copy of Engineers C&A Board Decision No. 1094, appeal of John V. Boland Construction Company, under Contract No. DA-25-066-eng-480.

Date:

ELIZABETH R. ANDESTAD
Recorder

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	1
Statute and Contract Provisions Involved	2
Statement	2
Argument	4
Conclusion	6
Appendix	7

CITATIONS

Cases:	
Acorn Decorating Corp. v. United States, 146 C. Cls. 394	6
Henry E. Wile Co. v. United States, 144 C. Cls. 394	5
United States v. Blair, 321 U.S. 730	4, 5
United States v. Callahan Walker Construction Co., 317 U.S. 56	4, 5
United States v. Holpuch Co., 328 U.S. 234	4, 5
Statutes and Contract:	
First War Powers Act, Title II, 55 Stat. 839	3
28 U.S.C. 2501	2, 6, 7
Contract No. DA-25-066-ENG-480:	
Art. 3	7
Art. 4	8
Art. 5	8
Art. 6	3, 6, 10

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 888

JOHN V. BOLAND CONSTRUCTION COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the Court of Claims granting defendant's motion for summary judgment (Pet. App. 1a) is unreported.

JURISDICTION

The order of the Court of Claims was entered on January 19, 1962. The petition for a writ of certiorari was filed on April 18, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether petitioner's failure to file a timely appeal before the Armed Services Board of Contract Appeals, as required by the "Disputes" clause of its

contract, precludes judicial consideration of its claim for extra compensation.

2. Whether petitioner's failure to file its claim until more than 7½ years after it completed, and the government accepted, the work called for by the contract barred this suit against the United States in the Court of Claims.

STATUTE AND CONTRACT PROVISIONS INVOLVED

The pertinent provisions of 28 U.S.C. 2501 and Contract No. DA-25-066-ENG-480 are set out in the Appendix, *infra*, pp. 7-11.

STATEMENT

On August 17, 1950, petitioner and the United States Army Corps of Engineers entered into contract No. DA-25-066-ENG-480 for the construction of a weather station and certain appurtenant facilities at Kirksville, Missouri (Pet. 6). Notice to proceed under the contract established June 13, 1951, as the completion date. Subsequently, a supplemental agreement was entered into whereby the Army was able to assume beneficial occupancy of certain buildings and facilities 90 days prior to the completion date (Pet. 6-7). For this advance in the beneficial occupancy, the government agreed to pay the sum of $114,752 (Pet. App. 29a). Beneficial occupancy was assumed on March 19, 1951, and the project was accepted as complete on September 10, 1951 (Pet. 7).

On May 11, 1953, petitioner filed a claim with the Corps of Engineers for $265,836.40 as extra compensation under the delays and changes clauses of

the contracts (App., *infra*, pp. 7–10).[1] The claim was denied by the contracting officer on October 2, 1953, and an appeal was taken to the Corps of Engineers Claims and Appeals Board on October 27, 1953 (Pet. 7–8). Thereafter petitioner revised and increased its claim to $272,063.07. After investigation and the issuance of findings of fact, the entire matter was forwarded under the "Disputes" article of the contract (Art. 6, App., *infra*, pp. 10–11) to the Corps of Engineers Claims and Appeals Board for decision on August 21, 1956. Hearings were held before that Board on November 27 and 29, 1956, in St. Louis, Missouri, and on June 19, 1958, the Board denied all but one item of the claim on the ground, *inter alia*, that petitioner had failed to protest or file a claim in a timely manner as required by the contract.[2]

On July 21, 1958, petitioner, purporting to proceed in conformity with Article 6, served a notice of appeal from the Engineers Board to the designate of the Secretary of the Army, the Armed Services Board of Contract Appeals. The government moved to dismiss the appeal as untimely since it was not taken within the time limit provided by Article 6 of the contract. On November 26, 1958, after reviewing the dates and determining that the appeal was not timely,

---

[1] Prior to this date, petitioner had filed a request for relief under Title II of the First War Powers Act, 55 Stat. 839. The request was denied.

[2] The Engineer Claims and Appeals Board observed that "[t]here is little doubt that such failure of [petitioner] to notify the Government of claim was prejudicial in that it did not have the timely opportunity to records events and costs, preserve testimony and proof, act to avert or mitigate the costs and consequences or otherwise protect its interests" (Pet. App. 39a).

the Armed Services Board of Contract Appeals dismissed petitioner's appeal.

Thereafter, on May 4, 1959, petitioner brought this suit in the Court of Claims to recover additional expenses for extra labor, material, and costs incurred in performing work under the contracts. The Court of Claims dismissed the petition on the ground that petitioner failed to exhaust its administrative remedy when it neglected to take a timely appeal from the decision of the Engineers Board and that its claim was barred by the statute of limitations.

ARGUMENT

The Court of Claims was clearly correct in deciding that petitioner failed to exhaust its administrative remedy and that its claim was barred by the statute of limitations. The decision of the Court of Claims is in accord with this Court's rulings in *United States* v. *Holpuch Co.*, 328 U.S. 234; *United States* v. *Blair*, 321 U.S. 730; and *United States* v. *Callahan Walker Construction Co.*, 317 U.S. 56. Accordingly, there is no occasion for review by this Court.

1. Petitioner argues that its claim is a damage claim outside the scope of the "Disputes" clause since "[t]he only provision of the contract which vests authority of decision in the administrative boards is Article 6, * * * and it expressly limits such decisions to disputes concerning *'questions of fact'* (Pet. 10). Petitioner's argument is based upon the theory that there was an implied agreement, fixed by law, that the government would pay petitioner for extra work and costs and that recovery should be allowed

in quasi-contract based upon the principles of unjust enrichment. The dispute, however, is patently a factual one and petitioner cannot circumvent the effect of its failure to file a timely appeal before the Armed Services Board of Contract Appeals by labeling its action in the Court of Claims as based upon an implied equitable agreement. It is plain that petitioner not only could have presented, but in fact did present, the same claim under the "Disputes" clause of the contract. "This mechanism * * * [of the "Disputes" clause] is exclusive in nature. Solely through its operation may claims be made and adjudicated as to matters arising under the contract." *United States* v. *Holpach Co., supra*, 328 U.S. at 239–240.

No more substantial is petitioner's claim that "[The contracting officer] * * * advised * * * [it] that because of the * * * work any formal request for an extension of time as prescribed by the contract would be denied" (Pet. 9). There is no evidence that a timely appeal to the Armed Services Board of Contract Appeals would have been futile or prejudicial. See *United States* v. *Blair, supra*, 321 U.S. at 736. In the absence of some clear evidence that the appeal procedure is inadequate or unavailable, that procedure must be timely pursued and exhausted before a litigant can be heard to complain in a judicial proceeding. *United States* v. *Holpach Co., supra*; *United States* v. *Callahan Walker Construction Co., supra*. See also *Henry E. Wile Co.* v. *United States*, 144 C. Cls. 394.

2. Petitioner also insists that it filed its claim within six years after it first accrued (see 28 U.S.C. 2501, App. *infra*, p. 7), since "[no] final determination was made by the contracting officer and no cause of action accrued until his decision denying the claim was rendered on October 2, 1953" (Pet. 12). But, if the question to be decided were, as petitioner contends, one of law, with respect to which Article 6 did not apply, and if the contracting officer was therefore without authority to decide it, certainly no cause of action could have accrued as a result of his adverse decision; rather, the cause of action could have accrued only at the completion of the contract, which was no later than September 10, 1951, more than six years prior to the filing of the suit.[3] Accord, *Acorn Decorating Corp.* v. *United States*, 146 C. Cls. 394.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
WILLIAM H. ORRICK, Jr.,
Assistant Attorney General.
JOHN G. LAUGHLIN, Jr.,
HARVEY M. GOLDBERG,
Attorneys.

MAY 1962.

[3] If, as we believe clear, petitioner's damage claim raised issues of fact within the Disputes Clause (Article 6), it forfeited its rights, as noted *supra*, by its failure to take timely administrative appeals.

APPENDIX

Section 2501, Title 28, United States Code, provides in pertinent part:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Contract No. DA-25-066-ENG-480 in pertinent part provides:

> ARTICLE 3. *Changes and Extras.*—The Contracting Officer may at any time, in writing, and without notice to the sureties, order extras or make changes in the drawings and/or specifications of this contract providing such extras or changes are within the general scope thereof. If such extras or changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim of the Contractor for adjustment under this article must be asserted in writing within 30 days from the date the extra or change is ordered: Provided, however, That the Contracting Officer, if he determines that the facts justify such action, may receive and consider, and, subject to such approval as the head of the department may require, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Article 6 hereof. But nothing provided in this article shall excuse the Contractor from proceeding with the prosecution of the work.

ARTICLE 4. *Changed conditions.*—Should the Contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent physical conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown physical conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the Contracting Officer shall be notified immediately in writing of such conditions before they are disturbed. The Contracting Officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ, the contract shall, subject to such approval as the head of the department may require, be modified to provide for an equitable adjustment in contract price and/or difference in time resulting from such conditions. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Article 6 hereof.

ARTICLE 5. *Delays—Damages.*—(a) Termination for Default.—If the Contractor refuses or fails to prosecute the work, or any separate part thereof, with such diligence as will insure its completion within the time specified in the contract, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the Contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby, as well as for liquidated damages for delay, as fixed in the specifications or accompanying papers, for such reasonable time as may be required to

complete the work, or if liquidated damages are not so fixed, the Contractor and his sureties shall be liable to the Government for any actual damages occasioned by such delays. If the Contractor's right to proceed is so terminated, the Government may take possession of and utilize for completing the work such material, appliances, and plant as may be on the site of the work and necessary therefor.

(b) Damages for Delay.—If the Government does not terminate the right of the Contractor to proceed, as provided in this article, the Contractor shall continue the work, in which event he and his sureties shall be liable to the Government, in the amount set forth in the specifications or accompanying papers, for liquidated damages for each calendar day of delay until the work is completed; or if such liquidated damages are not so fixed, any actual damages occasioned by the delay.

(c) Time Extensions.—The right of the Contractor to proceed shall not be terminated as provided in this article, nor the Contractor charged with liquidated or actual damages, because of any delays in the completion of the work due to causes which he could not reasonably have anticipated and which were due to causes beyond his control and without his fault or negligence, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, either in its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargo, and unusually severe weather, or delays of subcontractors due to such causes; provided however, that the Contractor shall promptly notify the Contracting Officer in writing of the causes of such delay. Upon receipt of such notification the Contracting Officer shall ascertain the facts and the extent of such delay and, if in his judgment the facts so justify, shall extend the

time for completing the work commensurate with the period of excusable delay. The Contracting Officer's findings of fact thereon shall constitute his decision which shall be final and conclusive on the parties hereto subject to appeal by the contractor within thirty (30) days therefrom as provided in the "Disputes" Article herein.

ARTICLE 6. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact which may arise under this contract, or disputes which may arise under the plans and specifications attached hereto, and which are not disposed of by mutual agreement, shall be decided by the Contracting Officer, who shall reduce his decision to writing and send by registered mail, return receipt requested, a copy thereof to the Contractor at his address shown herein. Within 30 days from the mailing thereof the Contractor may appeal in writing to the Chief of Engineers, whose written decision thereon, or that of his designated representative or representatives, shall be final and conclusive on the parties hereto unless, within 30 days after the receipt thereof by the Contractor, he appeals in writing to the Secretary of the Army, which appeal shall operate to vacate said decision of the Chief of Engineers. If the dispute is determined by the Secretary of the Army, his written decision, or that of his designated representative or representatives, shall be final and conclusive upon the parties hereto. The Chief of Engineers or the Secretary of the Army may designate an individual, or individuals, other than the Contracting Officer, or a Board, as his authorized representative to hear and determine appeals under this Article. In any proceedings under the provisions of this Article, the Contractor shall be afforded an opportunity to be heard and offer evidence in support of his appeal. Pending decision of a

dispute hereunder, the Contractor shall diligently proceed with the performance of this contract. Any sum or sums allowed to the Contractor under the provision of this Article shall be paid by the Government as part of the cost of the articles of work herein contracted for and shall be deemed to be within the contemplation of this contract.